Supreme Court, U.S.
FILED
NOV 21 1995
OFFICE OF THE CLERK

No. 95-525

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

TURECAMO OF SAVANNAH, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-525

UNITED STATES OF AMERICA, PETITIONER

v.

TURECAMO OF SAVANNAH, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

---

1. The panel of the court of appeals below specified five analytical flaws underlying the circuit precedent it was bound to follow when interpreting 46 U.S.C. 31342 (Supp. V 1993) and the public vessel exemption to that Section in the Maritime Commercial Instruments and Liens Act (MCILA), 46 U.S.C. 31301 *et seq.* Pet. App. 11a-14a. The panel suggested that, in light of the legal unsoundness of the circuit precedent, the court of appeals should reconsider the issue en banc. *Ibid.*

Respondent claims, to the contrary, that "the law in this area is relatively well-settled." Br. in Opp. 16. As its only support for that contention, respondent quotes a statement by the court of appeals that

"Congress 'has expressly stated its intent'" and "it is inappropriate to second-guess Congress' view of existing law." *Ibid.* (quoting Pet. App. 12a-13a). But Congress's express intent, as found by the court of appeals in the quoted passage, is directly contrary to respondent's view of the law. As the court of appeals noted, Congress intended to *prohibit*, not to permit, *in personam* actions under Section 31342 against the United States based on *in rem* principles. See Pet. App. 12a-13a & n.9.

Respondent attempts to defend the statutory interpretation that was applied by the court of appeals, despite the fact that that interpretation is inconsistent with the statute's plain text, structure and history. The linchpin of respondent's argument is a statement in the legislative history of the MCILA that the 1988 enactment of the MCILA was intended to make "no substantive change to law." See Br. in Opp. 3, 7, 8, 10, 11. Respondent relies on this statement to contend that the MCILA must be interpreted to permit *in personam* actions based on *in rem* principles because of respondent's view that the earlier law permitted such actions. *Ibid.* But the statement in the legislative history that no substantive change was intended was made before the statutory provision at issue in this case was added to the Act. That statement could not have been referring to the statutory language at issue here because that language was not yet in the proposed statute. This point is the first among those listed by the court of appeals as flaws in the statutory analysis of the circuit precedent. Pet. App. 11a-12a.

Respondent's assertions that later statements supporting petitioner's statutory interpretation are "ambiguous" or "confusing" (see Br. in Opp. 7, 8, 10)

are inaccurate. There is nothing ambiguous about the statement that "we have rewritten Section 31342 to clarify once and for all the fact that a claim may not be brought either in personal or in rem on a maritime lien theory against a public vessel," or the statement that "[i]t further clarifies the existing law that a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel." See 135 Cong. Rec. H9184, H9183 (daily ed. Nov. 20, 1989); *id.* at 30,803. Reversal of the court of appeals' ruling is required in order to vindicate that clear congressional intent.

2. Respondent errs when it states that, prior to the enactment of the MCILA, "a provider of necessaries to a United States vessel had an unquestioned right to pursue an *in personam* action, based on *in rem* principles, against the United States." Br. in Opp. 4. Respondent cites only *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521 (11th Cir. 1990) to support this point. *Ibid.*[1] When the MCILA was enacted in 1988, however, *Stevens Technical* was not yet decided. The MCILA could not have been enacted to codify a ruling made two years after

[1] Respondent also refers to a "longstanding substantive right—to pursue *in personam* actions in accordance with *in rem* principles" and to "preexisting decisional authority" which permitted such actions, but does not cite any authority that authorized such an action in the case of a provider of necessaries to a public vessel. Br. in Opp. 7. Respondent cites, instead, two other statutes that waive the United States' sovereign immunity against certain suits and have been interpreted to permit *in personam* actions based on *in rem* principles. Those statutes do not, however, create any substantive causes of action and do not provide a maritime lien cause of action to a company because it provided necessaries to a public vessel.

the MCILA was enacted. The court of appeals correctly demonstrated that the law in this area was not settled at the time the MCILA was enacted. See Pet. App. 12a-13a.

Respondent suggests that Congress enacted and then amended Section 31342 merely to prohibit *in rem* actions against public vessels, but not to prohibit *in personam* actions based on *in rem* principles. That suggestion makes no sense inasmuch as *in rem* maritime lien actions against public vessels have been forbidden for more than 70 years. See Pet. 20.

3. This case does not present a question of constitutional significance. Br. in Opp. 16. It is, however, a case in which the court of appeals has "so far departed from the accepted and usual course of judicial proceedings" that review and reversal by this Court are warranted. See Sup. Ct. R. 10(a). Despite suggestions by two of its panels,[2] the Eleventh Circuit has declined to give en banc reconsideration to circuit precedent that erroneously interprets a federal statute.

Failure of the Court to reverse the Eleventh Circuit will leave in place a legally unsound interpretation of the MCILA in a jurisdiction that gives rise to a significant amount of maritime activity. The

---

[2] In addition to the panel below, the panel of the court of appeals in the earlier case cited as binding precedent by the court below also had expressed dissatisfaction with the law of the circuit. It believed itself bound by an even earlier circuit precedent to permit *in personam* actions, despite Congress' express intent to prohibit such actions. See Pet. 16-17 & n.6; *Bonanni Ship Supply, Inc.* v. *United States*, 959 F.2d 1558, 1563 (11th Cir. 1992). That panel also unsuccessfully suggested rehearing en banc because circuit precedent conflicted with congressional intent. See Pet. 16-17 n.6.

issue in this case, either in the context of the MCILA or its predecessor statute, has reached the Eleventh Circuit four times in the past five years. See *Bonanni Ship Supply, Inc.* v. *United States*, 959 F.2d 1558 (1992); *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370 (1991); *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521 (1990). The Eleventh Circuit's refusal to reconsider the issue en banc leaves no avenue of relief other than reversal by this Court.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1995